the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it."

Accordingly the Court concluded that:

"The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

The total impact of the Supremacy Clause upon the question presented by this judgment for contempt is most sharply focused in *Harrison* v. *St. Louis-S. F. R. Co.*, 232 U.S. 318. The opinion of the Court, by Chief Justice White, is completely dispositive here. In striking down an effort of a state to restrict, even indirectly, the right of access to federal removal procedures the Court restated the fundamental principles first enunciated in *McCulloch, Brown* and *Martin*:

"It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render it in-

efficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application. However, though infrequent, occasions have not been wanting, especially on the subject of the removal of causes with which we are now dealing, where the general principle has been expounded and applied so as to cause the subject, even from the mere point of view of authority, to be beyond the domain of all possible controversy."

Applying this concept the Court then held in words directly applicable here:

"... as the right freely exists to seek removal unchecked or unburdened by state authority, and the duty to determine the adequacy of a prayed removal is a Federal, and not a state question, it follows that the states are, in the nature of things, without authority to penalize or punish one who has sought to avail himself of the Federal right of removal ...."

The conclusion is inescapable. The imposition of criminal penalties upon the good faith exercise of the federal removal remedy is, "in the nature of things", beyond the authority of a state. *Harrison* v. *St. Louis-S. F. R. Co.*, *supra.*

That the contempt judgment against Petitioner is an attempt "to penalize or punish one who has sought to avail himself of the Federal right of removal", *Harrison* v. *St. Louis-S. F. R. Co., supra,* is abundantly clear. As we have seen, the original rule to show cause rested wholly upon the trial judge's total misconception of the federal law governing removal. See Statement of Facts and Point III, *supra.* Nothing could be more obvious than that, if the removal remedy had not been attempted, the entire contempt proceeding would never have arisen. But what inextricably ties the imposition of the criminal penalty to the effort to utilize the federal right of removal is the extraordinary condition attached to the suspension of the imprisonment portion of the judgment, that Petitioner not state in future federal pleadings "allegations that are incorrect" (R, p. 117). There is, of course, not a shred of evidence in the record that the Petitioner ever made any misstatements in federal or state pleadings.

Apart from the impossible burden this places upon any attorney who desires in good faith to challenge actions of a state court judge, and the obvious "chilling effect", cf. *NAACP* v. *Button, supra,* this creates upon the exercise of a federal right, this condition exposes the true nature of the contempt proceeding. It is, in the words of Chief Justice White in *Harrison* an attempt to "directly or indirectly, destroy, abridge, limit, or render inefficacious" the federal remedy. This the Supremacy Clause prohibits.[21]

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[21] *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1, is most instructive in this respect. The Court there pointed out that:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented

POINT FOUR

The state court judgment of contempt violates the fundamental guarantee of right to counsel embodied in the Sixth and Fourteenth Amendments to the Constitution of the United States.

A judgment of criminal contempt which is based upon the good-faith efforts of an attorney to secure to a client facing the most extreme sanctions of the criminal law a remedy "to which he may think him even probably entitled," *Wells* v. *Commonwealth, supra,* violates the fundamental guarantee of right to counsel embodied in the Sixth and Fourteenth Amendments to the Constitution of the United States, *Holt* v. *Virginia,* 381 *U.S.* 131; *NAACP* v. *Button,* 371 U.S. 415; *Brotherhood of Railroad Trainmen* v. *Virginia,* 371 U.S. 1; *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967).

The decision of this Court in *Holt* v. *Virginia, supra,* is dispositive here. In holding that the attempts of the attorneys there involved to secure the federally guaranteed right to a fair and impartial tribunal, could not, consistent with the Constitution of the United States, ground the imposition of criminal sanctions, the Court pointed out:

> " . . . it is settled that due process and the Sixth Amendment guarantee a defendant . . . 'an opportunity

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in law suits authorized by Congress to effectuate a basic public interest." 377 U.S. at 6, 7.

So here, the state may not by invoking the power of contempt infringe in any way upon the right to be represented in a civil rights removal proceeding, a "law suit authorized by Congress to effectuate a basic public interest", 377 U.S. at 6, 7.

> to be heard in his defense—a right to his day in court— . . . and to be represented by counsel.' . . . The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues . . . . And since 'A fair trial in a fair tribunal is a basic requirement of due process,' *In re Murchison,* 349 U.S. 133, 136, it necessarily follows that motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential" [381 U.S., at 136].

Accordingly, the Court concluded, in directing the reversal of the contempt of court convictions in that case:

> "Our conclusion is that these petitioners have been punished by Virginia for doing nothing more than exercising the constitutional right of an accused and his counsel in . . . cases such as this to defend against the charges made" [381 U.S., at 138].

The words of this Court in *Holt* apply with far greater force here. This Petitioner stands criminally charged for good-faith conduct as an attorney in pursuing a remedy made available to his client under federal law for the express purpose of providing a fair and impartial tribunal. A criminal conviction of an attorney for good-faith conduct involved in pursuing the remedy violates both his and his client's fundamental rights under the federal Constitution.[22]

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[22] Unlike *Holt* v. *Virginia,* there is no charge raised by the Commonwealth that the removal petition in this case was anything but proper, see Statement of Facts, *supra,* or that in seeking to obtain a federal forum for a fair and impartial trial under the Federal Civil Rights Removal Statute the petition contained any "contemptuous language" or any "personal attack upon the integrity or honor of the court," cf. *Holt* v. *Commonwealth,* 205 Va. 332.

Within the context of the criminal case out of which these contempt of court charges arise, *Wansley* v. *Commonwealth*, the imposition of criminal sanctions upon Petitioner's conduct raises particularly grave implications. The *Wansley* litigation has been among the most publicized cases in recent Virginia experience. As this Court knows from its previous consideration of cases similar to *Wansley*, cf. *Powell* v. *Alabama*, 287 U.S. 45, such criminal prosecutions involve the most emotion-laden, serious and controversial questions including such issues as the ability of a Negro citizen to obtain a fair trial in the community atmosphere, the existence or non-existence of the exclusion of Negro citizens from grand and petit juries in the local administration of justice, as well as other questions, charged with tension, which present themselves inevitably in this type of case.

Only an independent and fearless bar, "free and unembarrassed in the discharge of [its] professional duty," *Wells* v. *Commonwealth, supra,* can assist in providing, in emotion-charged controversial litigation, "that fair and impartial trial" guaranteed by the Constitution of the United States. But as, unhappily, this Court has had the occasion of pointing out, "lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather a dearth of lawyers who are willing to undertake such litigation," *NAACP* v. *Button, supra.* The sustaining of this criminal contempt judgment against this Petitioner, a young white member of the Virginia Bar with a hitherto unblemished record at the Bar, see Statement of Facts, *supra,* cannot help but have a "chilling effect," cf. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *NAACP* v. *Button, supra,* upon the

effective and aggressive participation of Virginia lawyers in cases of importance involving fundamental issues of the rights of Negro citizens to "free and impartial" trials in the courts of this State.

Consequently, we suggest, the implications of this case reach far beyond the impact of the judgment of conviction of criminal contempt upon this Petitioner, as serious as they are. It presents, ultimately, a question of "utmost importance to the proper administration of justice." *Wells* v. *Commonwealth, supra.*

If lawyers are deterred or intimidated in the performance of their duties enjoined upon them by the highest traditions of a profession which commands that "no fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty," Canon 15 of the *Canons of Ethics,* then not only the individual lawyer or client suffers. Society, itself, in the recent words of this Court, "might be the loser." *Dombrowski* v. *Pfister, supra.* The activities of Petitioner as demonstrated in this record reflect that "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability" required by the *Canons.* Such activity advances the "great interests of society," *Wells* v. *Commonwealth, supra.* To the degree that fearless representation of Negro defendants confronted with the complexity of constitutional problems presented by the *Wansley* cases is readily available in the courts of Virginia by members of the Bar of that State, this "honorable and useful profession" will meet the high standards set for it by the Virginia Court in *Wells* v. *Commonwealth.* Petitioner cannot be punished constitutionally for striving to meet this goal.

POINT FIVE

The state court judgment of contempt violates the First Amendment to the Constitution of the United States as incorporated into the Fourteenth Amendment.

The judgment of conviction, if sustained, has even further constitutional implications. Any imposition of criminal sanctions which rests upon an effort to utilize the federal civil rights removal remedy, would violate the fundamental liberties guaranteed by the First Amendment to the Constitution as incorporated into the Fourteenth Amendment. For, as this Court has pointed out in *NAACP* v. *Button, supra,* litigation which utilizes remedies such as the Civil Rights Removal statutes is not solely "a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the Negro community in this country. It is thus a form of political expression." 371 U.S. at 429. See also the recent opinion of the Court in *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U.S. 217 (1967).

This case presents a classic example of the teaching of *Button* and *United Mine Workers.* The federal removal petitions raised serious and substantial questions concerning the equality of treatment of Negro citizens in the local judicial system in the City of Lynchburg. This utilization of the channels of litigation to achieve the "lawful objective of equality of treatment" is in its pristine sense a "form of political expression," and the imposition of criminal punishment upon its exercise might "well freeze out of existence all such activity on behalf of the civil rights of Negro citizens," *NAACP* v. *Button, supra,* at pp. 435, 436.

This the First Amendment, as incorporated into the Fourteenth, prohibits. *NAACP* v. *Button, United Mine Workers* v. *Illinois, Dombrowski* v. *Pfister,* all *supra.*

POINT SIX

The state court judgment of contempt violates the notice requirement of the Due Process Clause of the Fourteenth Amendment.

The judgment of conviction for criminal contempt of court further violates Petitioner's fundamental right to due process of law guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. It is an elementary proposition of our law that citizens may not be convicted in a court of law on charges not made. *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *Garner* v. *Louisiana,* 368 U.S. 157; *Shuttlesworth* v. *Birmingham,* 376 U.S. 339 (1964). It is for this reason that in contempt proceedings the courts have been scrupulously insistent that defendants be afforded "an exact idea of the purposes of the charges". *Cooke* v. *United States,* 267 U.S. 517, 537 (1925); see also *Russell* v. *United States,* 369 U.S. 749, 768 (1962).

The importance of this insistence in *Cooke* is dramatically illustrated in this case. Petitioner stands convicted upon a theory and upon a charge never contemplated at the issuance of the rule to show cause, and the refusal of the trial judge to specify the conduct for which he was accused of contempt made inevitable, and indeed intensified, the denial of due process which resulted.[23]

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[23] When petitioner requested, on June 13, 1966, to be told the exact nature of the charges against him he was told in a letter from the trial judge that "the Rule states the reason for the issuance of the citation". Letter of Judge Cundiff, June 20, 1966. See Statement of Facts, *supra.*

As we have seen, the trial judge ordered the issuance of the rule because he felt, and so expressed himself on the record, that the removal had not been completed in the absence of an "order" from the federal court and that he therefore retained jurisdiction to proceed with the trial. (See Statement of Facts, *supra*). Accordingly, the record reveals that the Judge ordered Petitioner to show cause why he should not be held in contempt for failing to be present at that time in order to proceed with the criminal trial. (See Statement of Facts, *supra*). Thus the rule, predicated upon a wholly erroneous concept of the governing federal law, cf. Title 28, U.S.C. 1446, and cases discussed in Point II, *supra,* charged Petitioner, in essence, with failing to be present in order to try the criminal case the morning of February 14th. But as we have shown, neither the trial Judge nor the Commonwealth pursued this obviously erroneous theory at the actual contempt trial. Instead, the Commonwealth and the Judge both sought to construct other and different theories, based on other and different conduct, to sustain a finding of criminality. The Commonwealth urged some variant on a "duty" to notify the adversaries and the Court *prior* to actual removal. The Court appeared to rest on some conception that there was "jurisdiction" in the trial court from 9:30 A.M. until the moment of actually filing,[24] and that, accordingly, Petitioner had some sort of "duty" to be present personally to notify the state court of the removal proceeding.

We have demonstrated in Point II, *supra,* that both of these theories are as equally without legal foundation as

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[24] As we have pointed out in the Statement of Facts, the trial court was completely in error in suggesting that the petition was filed after 9:30 A.M. The uncontradicted testimony is that the petition was tendered *and* stamped prior to 9:30. See Statement of Facts, *supra.*

the original assumption of the trial judge that federal removal is not accomplished until some sort of an "order" is entered by a federal court. But the legal insufficiency of these later contrived theories is not the issue here. Due process of law requires that a person be tried on the charge made—not on some charge later devised in an effort to sustain a criminal conviction. *Cole* v. *Arkansas, supra.* Petitioner was not tried on the charge originally made—that he was required to be present to try the state criminal proceeding due to the "incompleteness" of the federal removal effort. He may not now be convicted on a new charge fashioned to avoid the now conceded legal insufficiency of the original charge. The Constitution prohibits any such evasion of the requirements of the Due Process Clause. *Cole* v. *Arkansas, supra.*

POINT SEVEN

The state court judgment of contempt constitutes selective enforcement of state law in violation of the Fourteenth Amendment.

The judgment of conviction for criminal contempt of court further violated Petitioner's rights under the Fourteenth Amendment in that the rule to show cause and the contempt judgment constituted a selective enforcement of state power in violation of the Constitution of the United States. *Cox* v. *Louisiana,* 379 U.S. 536; *Adderly* v. *Florida,* 385 U.S. 39, 87 S. Ct. 242; *Edwards* v. *South Carolina,* 372 U.S. 229.

One of the most unusual and troublesome aspects of this proceeding has been the disparity of treatment afforded to Petitioner and the other attorney in the case. Although

Mr. Kunstler was concededly the senior trial counsel in the case (TR. July 12, p. 9), and could have been served with a rule to show cause under Rule 16 of this Court, and was personally within the jurisdiction of the Corporation Court during the pendency of these proceedings (see TR. April 8), only Petitioner was charged with criminal contempt of court. This was in the face of admitted testimony adduced by Petitioner from Mr. Kunstler that Petitioner's conduct in this matter was wholly under the direction of Mr. Kunstler as senior trial counsel (R, p. 89).

Moreover, the extraordinary disparity in treatment accorded to Petitioner is highlighted by the fact that on precisely the same facts and the same record upon which the Petitioner was found guilty of criminal conduct, Mr. Kunstler was reinstated to the rolls of attorneys by the same Judge who pressed the criminal proceedings against Petitioner (R, p. 66). The evil of selective enforcement of an instrumentality of state power is that it permits an "invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment". *Cox* v. *Louisiana*, 379 U.S. at 580-81. (Concurring opinion of Mr. Justice Black.) Where selective enforcement of the criminal contempt power of a court may result, as here, in a "chilling effect", cf. *Dombrowski* v. *Pfister, supra,* upon the willingness of local members of the Virginia Bar to accept the high responsibility of representation in serious cases replete with federal constitutional issues of an emotion-ridden nature, cf. *NAACP* v. *Button, supra,* "it is of the utmost importance to the proper administration of justice", *Wells* v. *Commonwealth, supra,* that this Court review this judgment of contempt.

POINT EIGHT

The conduct of the contempt proceeding by the original trial judge deprived Petitioner of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

This petition raises a substantial and serious issue in the proper administration of law which requires the consideration of this Court. There is a very serious question as to whether, upon the record of this case, the original trial judge should have sat as judge on the contempt trial. This precise question was specifically reserved as open and not decided by this Court in *Holt*. Thus in fn. 2 to the Opinion, the Court specifically states "we neither reach nor consider the questions as to whether . . . Judge Halladay was so personally embroiled and interested in the controversy that he should not have decided the contempt issue". 381 U.S. at pp. 135, 136.

The opinion of Mr. Justice Frankfurter for the Court in *Offutt* v. *United States*, 348 U.S. 11 (1954) would appear to be instructive in this respect. In this case the Court reversed a contempt conviction against an attorney on the precise ground that the original trial judge should not have tried the contempt proceedings. Mr. Justice Frankfurter's opinion develops the fundamental concepts which underlie the conclusion of the Court. Thus the Justice wrote:

> "It [the contempt power] is a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage. The power thus entrusted to a judge is wholly unrelated to his personal sensibili-

> ties, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer."

The Justice went on to say:

> "The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."

In discussing these concepts the Justice invoked an earlier holding of the Court in *Cooke* v. *United States*, 267 U.S. 517. In that case, Chief Justice Taft pointed out in words relevant here:

> ". . . where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place." 267 U.S., at 539.

Mr. Justice Frankfurter, in *Offutt*, placed the issue in terms instructive in the present situation:

> "The real issue is whether under the decision of the Cooke case such a ruling should have been made

by the trial judge, or whether for the very purpose of vindicating justice for which the power of summary contempt is available, the determination of petitioner's guilt and the punishment properly to be meted out on a finding of guilt should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct."

The opinion of Mr. Justice Black for the Supreme Court in *In re Murchison,* 349 U.S. 133 (1955) is further instructive. In reversing contempt of court convictions, the Justice reiterated a basic concept which is highly relevant here:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the ap-

pearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14."

Applying this concept, fundamental to our jurisprudence, the Justice went on to illustrate why in situations like the present case, where the actual charged contempt is not committed in the courtroom, and where the presiding judge has become involved in the proceedings, essential fairness requires another judge to try the contempt.

"It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations . . . Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. See *Cooke* v. *United States,* 267 U.S. 517, 539. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here. . . . If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant.

> In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way." 349 U.S. at pp. 137, 138, 139.

The teaching of the Court in *Offutt, Cooke* and *Murchison* is highly relevant here. We ask the Court to consider for example whether it may be fair to infer from this record that "the contempt charged is entangled with the judge's personal feeling against the lawyer." *Offutt* v. *United States,* at p. 14. In this connection we call the Court's attention to the following statement of the trial judge appearing on the record:

> "And so the rule was issued for him because he did not appear in his solemn duty to appear. I am not charging him with or trying him for not possessing common courtesy—the lawyers do possess towards one another, that is not contempt. Lawyers do possess those qualities, but evidently he does not have that quality among them, as one of his." (R, pp. 78, 79, July 12, 1966).

Or this statement appearing on the record:

> "The Court: Well, of course members of the bar in this section that we deal with, we have never had this type of difficulty.
>
> Mr. Hirschkop: I am sorry, I didn't understand that.

> The Court: I said members of the bar in this section that we deal with, we never had this difficulty." (TR., p. 65, cross-examination of Ruth Harvey, not in official record).

Or this statement appearing on the record:

> "I wrote you and told you that the court reporter had a nervous breakdown but you alleged wilful withholding on behalf of the Court after I told you that she had a nervous breakdown. It shows lack of good faith, anyway, in believing what the Court tells you even."

These may not be, in and of themselves, overpowering evidences of prejudice as to require disqualification in an ordinary proceeding. But as the Court said in *Offutt,* "the vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. *Therefore, justice must satisfy the appearance of justice.*" 348 U.S. at 14. (Emphasis added).

But there are other even more compelling reasons why in this case justice required that the trial judge not sit in a case in which he had become a "part of" the accusatory process. Cf. *In re Murchison, supra.* As we have seen, fundamental to the entire case was the correctness or incorrectness of the judge's own conception of the effect of the federal law of removal upon the events of February 14th. If he was wrong in his conception, then the conduct of the attorneys assumed a wholly new cast. But as the Court said in *Murchison,* "no man can be a judge

in his own case". 349 U.S. at 136. Furthermore, it became crystal clear at the close of the contempt trial that the judge was deeply motivated by what he conceived to be the "incorrect" allegations claimed to have been filed in federal courts by the Petitioner (R, pp. 117, 118). But as in *Murchison*, the State may not have "the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine". 349 U.S. at 139. For as the Court concluded: "the right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way". 349 U.S. at 139. The inappropriateness of the trial judge in having sat as judge in the contempt trial is dramatically illustrated by the fact that the prosecution chose to put in issue the question of the "appearance" and "demeanor" of the trial judge on February 14th. The prosecution actually put on two witnesses, one Miss Mary M. McCarron, the judge's own secretary (R, p. 56) and Sergeant Wilkinson (R, p. 59) solely for the purpose of adducing evidence as to whether the judge was "upset" (R, p. 60), as to whether he "is a very placid individual" (R, p. 60), as to whether "he appeared upset or mad or angry or show any emotions as a result of the lack of the proceedings getting underway that day" (R, p. 61), or whether "he is the type of person who is easily upset" (R, p. 6).

It is inconceivable to us that under such circumstances the trial judge could sit as judge in the contempt trial. We would suggest that no record has ever presented to an American court so sharply the importance of enforcing the elementary concept of our jurisprudence expressed in *Murchison* that "no man can be a judge in his own case and no man is permitted to try cases where he has an

interest in the outcome." 349 U.S. at 136. As the Court said in *Offutt,* "justice must satisfy the appearance of justice". 348 U.S. at 14. The conviction of contempt must be set aside, at a minimum in the words of *Offutt* to "satisfy the appearance of justice".

CONCLUSION

The questions raised in this petition are serious and substantial. They affect not only fundamental rights of the Petitioner but raise the most serious questions touching the independence of the bar. They are questions which call for the intervention of this Court in its highest role—as protector of those democratic institutions which are the "bedrock of our political system." *Reynolds* v. *Sims,* 377 U.S. 533. The petition for writ of certiorari should be granted and the judgment below reviewed by this Court.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the Supreme Court of Appeals of Virginia, March 10, 1969, Opinion by Justice Albertis S. Harrison, Jr.

Philip J. Hirschkop, plaintiff in error, hereinafter referred to as defendant, was found guilty of criminal contempt in the court below and his punishment fixed at a fine of $50 and a sentence of 5 days in jail. The trial court suspended the execution of the sentence to jail, "on condition that the said Philip J. Hirschkop in all future dealings with the court conduct himself with decorum and in a manner befitting an attorney at law". Final order was entered on September 13, 1966.

Defendant, having intimated his desire to present a petition for a writ of error to the judgment, the trial court ordered that execution on its judgment be suspended until the 1st day of the December term, 1966.

The petition of defendant for a writ of error and *supersedeas* to the final judgment rendered by the court below was maturely considered, and this court being of opinion that the appeal was not perfected in the manner required by law, did accordingly reject the said petition and refused said writ of error and *supersedeas*. The order of this court dated April 26, 1967, assigned the following reasons:

> "Final judgment, from which the petitioner seeks a writ of error, was entered on September 13, 1966. The transcripts of testimony were not tendered to the trial court within 60 days of the final judgment and were not signed by the trial court within 70 days of the final judgment, all as required by Rule 5:1, § 3(e), and such transcripts are not, therefore, part of the record. No-

tice of appeal and assignments of error were not filed prior to the expiration of sixty days after final judgment, as required by Rule 5:1, § 4. The petition for writ of error and the record were not filed within four months after final judgment, as required by Rule 5:4 and Code, § 8-463 and § 8-489."

On May 24, 1967, defendant lodged in the clerk's office of the court below a motion that the trial court vacate its judgment of contempt and set aside its sentence of September 13, 1966. This motion was filed by leave of court on June 5, 1967, on which date the trial court overruled the same, and to which ruling defendant excepted. The trial court, at the instance of defendant, who intimated his desire to present a further petition for a writ of error and *supersedeas,* ordered that execution of the foregoing judgment be further suspended for a period of sixty days.

Upon the petition of defendant, a writ of error and *supersedeas* were awarded him to the judgment rendered by the court below on the 5th day of June, 1967, and the case is before us again pursuant to this writ of error.

The Attorney General moves that the appeal be dismissed for the reason that the judgment rendered September 13, 1966 had become final before the defendant filed his motion to vacate on June 5, 1967, and, the trial court being without jurisdiction to modify or vacate said judgment, or any part thereof, this court has no power or jurisdiction to vacate it.

Upon consideration of the briefs and argument of counsel, we are of opinion that the motion to dismiss is well-made and should be granted. The authority for a court to vacate a judgment is found within the language of the Rules of this court. Section 1:9 reads as follows:

> "All final judgments, orders and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified or vacated for twenty-one (21) days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas."

Rule of Court 3:21, relating to "Practice and Procedure in Actions at Law", is consistent with Rule 1:9.

It will be noted that all final judgments remain under the control of the trial court and are subject to be modified or vacated for 21 days after the date of entry and *no longer*. True, in a criminal case the trial court may postpone execution of the sentence in order to give an accused the opportunity to apply for a writ of error and *supersedeas*. However, this does not affect the finality of the judgment, and the trial court loses control over it after an elapse of 21 days from the date of its entry. The judgment of the trial court against defendant, having been entered September 13, 1966, became final on October 4, 1966, and the trial court was without authority to vacate it after that date.

On the question of the finality of judgments and the effect of a suspension of execution, it was said in *Bridges* v. *Commonwealth*, 190 Va. 691, 697, 698, 58 S. E. 2d 8, 11 (1950) that:

> "The fact that the court in its order of May 28, 1949, under authority of sec. 6338 (sec. 8-465, Code, 1950), and for the purposes therein contemplated, suspended execution of the judgment, did not prevent it from becoming final.

"In *Harley* v. *Commonwealth,* 131 Va. 664, 108 S. E. 648, this language is used:

"'* * * * The fact that execution of the judgment was suspended under the provisions of section 6338 of the Code, did not affect the finality of the judgment in that court.' (131 Va. at p. 666.)"

In *John Lewis Smith* v. *Commonwealth,* 195 Va. 297, 301, 77 S. E. 2d 860, 863 (1953), we held:

"After twenty-one days from its date of entry, a voidable judgment can be corrected only by writ of error to this court for review, and proper steps must be taken to obtain the review within the time prescribed by statute. A final judgment or sentence valid in a court of original entry is final and conclusive upon all courts (except on appeal) after the court pronouncing judgment has lost jurisdiction of the case."

In *Martin Thomas Smith* v. *Commonwealth,* 207 Va. 459, 150 S. E. 2d 545 (1966), the facts are that on the twenty-first day after judgment, Smith's counsel filed motion for new trial with the clerk, requesting that the motion be held in abeyance pending transcription of the record. No hearing was had for nearly a month. Under these circumstances the judgment having become final at the end of twenty-one days under Rules 1:9 and 3:21, it was held that no error was committed in denying the motion for new trial.

Defendant relies upon *Loving* v. *Commonwealth,* 206 Va. 924, 147 S. E. 2d 78 (1966). That case is not apposite to the instant case. In *Loving* the final judgment of conviction was entered on January 6, 1959, wherein one-year jail sentences were suspended for a period of twenty-five years.

The suspension period having been fixed, the trial court had the authority under Code § 53-275, *supra,* to revoke or modify it at any time during the 25-year suspension period. The motion to vacate the judgments and set aside sentences was filed on November 6, 1963. But more important, in *Loving,* the statute under which the conviction was had was attacked as violative of the Constitutions of Virginia and of the United States, and the sentences imposed were attacked as invalid. Manifestly the judgment convicting defendant of contempt on September 13, 1966 is not void on its face, and it is not so alleged by defendant.

Furthermore, it does not appear from the opinion in *Loving* that the question of jurisdiction was raised or that any motion to dismiss was made by the Commonwealth. Certainly *Loving* does not stand for the proposition that any judgment which has become final can be vacated. The attack in that case was a collateral one. Here defendant makes a direct attack on a judgment which is final. The granting of the writ of error and *supersedeas* on December 4, 1967, which brings this case before us, did not alter the situation as it existed on June 5, 1967 when the trial court overruled defendant's motion to vacate the judgment and set aside the sentence. Neither did it affect the finality of defendant's conviction.

Many assignments of error are made by defendant. They are substantially the same as were made in his petition for writ denied on April 26, 1967. However, the errors assigned are the kind which can only be corrected by writ of error to this court for review. We are not dealing here with a void judgment, or a sentence which is a mere nullity and subject to collateral attack in any court.

Defendant's motion to vacate the judgment of September 13, 1966, and set aside the sentence imposed on him,

filed June 5, 1967, came more than 21 days after this judgment had become final, and after this court had refused defendant a writ of error. The trial court was without authority to entertain the motion, and this court is without jurisdiction.

In *Stacy* v. *Mullins,* 185 Va. 837, 841, 40 S. E. 2d 265, 266 (1946), we quoted with approval from *Union Pacific Ry. Co.* v. *Ogilvy,* 18 Neb. 638, 26 N. W. 464, as follows: "'* * * * The rule is well settled that, if the court in which the action is brought has no jurisdiction of the subject matter, the appellate court will acquire none by the appeal. . . .'" See also *Addison* v. *Salyer,* 185 Va. 644, 40 S. E. 2d 260 (1946); *Hoffman* v. *Stuart,* 188 Va. 785, 51 S. E. 239 (1949).

In 4 C. J. S., Appeal and Error, § 41, p. 158, it is said: "An appeal from an inferior court or tribunal which has no jurisdiction of a cause confers no jurisdiction on the appellate court." To the same effect, see 1B Mich. Jur., Appeal and Error, § 15, p. 140-141, where it is said:

> "If an inferior court or tribunal has no jurisdiction to hear and determine a cause, an appeal from a judgment rendered therein does not confer upon a court of superior rank a jurisdiction not possessed by the former, though it may have had authority in the first instance to adjudicate the matter in controversy in its entirety. Where the supreme court of appeals is without jurisdiction, it is without authority to consider any other question raised in a petition for a writ of error. However, the supreme court of appeals may take jurisdiction of a case by writ of error to avoid judgment for the sole purpose of adjudicating the invalidity of that judgment."

In the case of *Pifer* v. *United States,* (*W. Va.*), 158 F. 2d 867, *cert. denied* 329 U. S. 815, 67 S. Ct. 636, 91 L. ed. 695, the appellant was convicted in 1939 on two indictments and in 1946 he filed a Motion to Vacate the sentences imposed upon him, making three contentions, the third of which was "that the facts in evidence show that only one crime was committed." The court denied relief and in its opinion we find this:

> "As to the third contention, nothing is better settled than that a motion such as this to vacate a judgment cannot be used to review the sufficiency of the evidence or the proceedings had on the trial as upon appeal or writ of error. *Ong* v. *United States,* 4 Cir., 131 F. 2d 175."

For the reasons stated, the motion to dismiss is granted and the writ is

Dismissed.

APPENDIX B

Opinion of Trial Judge at Contempt Proceeding, Corporation Court of the City of Lynchburg, Judge O. Raymond Cundiff, 9/13/66

The Court: Well, gentlemen, as I reiterated before when the case was heard on your motion to dismiss, the allegation, as I recall, was made in the petition for removal that the contempt citation was issued because the case was removed. Well, that had absolutely nothing to do with the citation. The removal petition was not the slightest concern of this Court when the contempt citation was issued. Of course, contempt citations, personally I realize that as between counsel and me individually there is nothing between him and me, but I have the duty of upholding the dignity of this Court and the Commonwealth of Virginia and there must be respect for courts, if there is not respect for courts then we don't have any respect in this country. That is the position this Court takes.

The evidence discloses that this case could not have been, a removal petition could not have been filed prior to 9:30. Miss Petticrew testified she left there and coming immediately here—well, it takes only two or three minutes to get here, she said as soon as she filed the removal petition she left immediately and came to this court. Well, that was five minutes to 10:00 when she got here so giving her five or ten minutes it was quarter to 10:00 when the removal petition was filed. It is obvious that it had to be after 9:30. Mr. Hirschkop himself stated that at 9:23 he called and assuming he talked only two or three minutes it would put it at 9:25 or 9:26. Then she did not receive it; she talked to the chief clerk who was on long distance. Whether it is

right or wrong what she did is one thing, but when this court convened at 9:30 and a removal petition had not been filed then this court had jurisdiction to proceed and there was no attorney here at that time to proceed. At 9:30 o'clock the petition, according to the evidence before this Court, had not been filed; whether it was wrongful on the part of the United States District Court in not receiving it, but this court had jurisdiction at 9:30 and there was no attorney to answer at that time.

Irrespective of whether the petition was filed or not, though, it was solemn obligation on the part of counsel to be present and advise this Court that the petition had been filed. When he made an engagement to set a case this Court is of the opinion that when the case comes up for trial that the person should be here just in answer to his obligation as a lawyer and state that it has been removed or what the situation is. Just to leave it up in the air and let the Court go wondering as to what has happened to the case, I don't think it is the law. The cases are plain, all I have ever read—I think you gentlemen are probably familiar with the annotation in ALR 97, ALR 2nd, beginning at Page 433 in which it says (reading):

> "In the United States as a general rule any absence of an attorney from a courtroom or other place where he has a duty to appear before a Judge or other court officer at a specified time for the purpose of participating in a trial hearing or other proceeding in which he is counsel or the taking of any necessary step, including an appeal, may constitute contempt."

It states further:

> "Generally in the United States that an attorney's failure to attend a court at a time appointed when

he has a duty and obligation to be present may amount to and be punishable as contempt is crystal clear. In none of the cases cited in the American courts and falling within the scope of this annotation has any court so much as intimated a contrary view." (Ends reading)

The Court is therefore of the opinion that Mr. Hirschkop is guilty of criminal contempt for failure to appear and I fix his punishment at a fine of $50.00 and sentence him to five days in jail.